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Cases Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

STATE OF MISSOURI ex rel. THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY,
Plaintiff in Error,

vs.

AMERICAN FRUIT GROWERS, INC., and WILSON A. TAYLOR, Judge of the Circuit Court of the City of St. Louis,
Respondents.

No. 376.

BRIEF OF RESPONDENTS.

STATEMENT.

The American Fruit Growers, Inc., is a corporation organized under the laws of the State of Delaware, but is and was at all times during this litigation licensed to do business in the State of Missouri, maintains an office in the City of St. Louis and has an agent and employes in St. Louis.

Suit was filed in St. Louis by the American Fruit Growers, Inc., against the St. Louis, Brownsville & Mexico Railway Company on account of damages to three shipments, all originating in the State of Texas, but with three (3) different destinations outside of the State of Texas, as follows:

The first count deals with a shipment from La Feria, Texas, to Pittsburgh, Pennsylvania, with the American Fruit Growers, Inc., as consignee. The second count deals with a shipment from Mercedes, Texas, to Cleveland, Ohio, to the same consignee, and the third count deals with a shipment from Harlington, Texas, to St. Louis, Missouri, also to the same consignee. Suit was brought under the State Attachment Law, and the Illinois Central Railroad was garnished. The petitioner sued out a writ of prohibition in the Supreme Court of the State of Missouri, which Court duly issued its preliminary writ, but after a hearing quashed its preliminary writ, holding that there is nothing in the Carmack Amendment which denies the right of a consignee to sue in the state court under the Carmack Amendment, although service is obtained by publication in the usual form provided for under the State Attachment Laws.

The petitioner in this case challenges the correctness of the ruling of the Supreme Court of the State of Missouri on the ground that the said ruling vio-

lates both the commerce clause and the due process law in the Federal Constitution. We shall discuss these in order.

I.

The petitioner takes the position that the ruling giving the shipper the right to bring suit by attachment is an interference with interstate commerce and contravenes the rule as laid down in Railway Co. v. Varnville, 237 U. S. 604, and Railway Company v. Winfield, 244 U. S. 153.

We shall discuss petitioner's position and point out that its authorities are wholly inapposite.

In the Varnville case South Carolina had enacted a law to the effect that the carrier, failing to pay a claim promptly in a case growing out of an interstate shipment, should pay a penalty of fifty dollars. The United States Supreme Court held that this was an interference with interstate commerce. That this case is not at all in point and that the principle enunciated in the Varnville case is not at all applicable to the case at bar is immediately obvious. In the Varnville case there was an interference with interstate commerce and there was an undue burden placed upon the same.

In the case at bar the bringing of the attachment has nothing to do with the interstate shipment, but is

merely an incident to a suit, being proceedural and affecting the remedy.

Evans-Snider-Buel Co. v. McFadden, 185 U. S. 505;

Rice et al. v. Adler-Goldman Com. Co., 71 Fed. 151;

Peoples Saving Bank & Trust Co. v. Batchelder-Egtas Co., 2 C. C. C. A. 1264, U. S. App. 6035, 1 Fed. 130;

Hanscom v. Malden & Melrose Gaslight Co., 220 Mass. 8.

However, as herein pointed out, this Court allowed the assessment of attorney's fees as part of the court costs in cases arising under interstate commerce laws where such fees did not exceed two hundred dollars ($200.00) (M. K. & T. R. R. v. Harris, 234 U. S. 412). This case will be adverted to hereafter.

In the Winfield case, cited by the petitioner, the United States Supreme Court merely held that the Federal Employers' Liability Act so completely covered the subject of liability of interestate carriers for death or injury to employes while engaged in interstate commerce that a state act which undertakes to cover the same subject matter is invalid. That this case is not at all applicable is well illustrated by the fact that Mr. Justice Brandeis, who wrote the opinion in the Davis, Director, case, cited by the petitioner as well as the respondent, and who recently wrote the

opinion in the case of Wells v. Atchison, Topeka & Santa Fe Railway Company, in which he expressly approves the doctrine in the Davis case in the Wells opinion, and yet denies a recovery in the Wells case, dissented in the Winfield case, holding that the mere fact that Congress has legislated upon the subject does not indicate that the states are cut off from legislation relating to the health, life and safety of their citizens, although the legislation might indirectly affect the commerce of the country, and that the legislation of a state is not necessarily inconsistent with action taken by Congress. We are not presenting this as our views, but simply to illustrate the fact that Mr. Justice Brandeis, upon whose opinions petitioner relies in its brief, did not have in mind when he wrote the opinions in the Davis and Wells cases, respectively, that all state action constitutes an interference with interstate commerce, even after Congress has legislated upon the subject matter.

II.

It is urged by the petitioner that the Supreme Court of Missouri, in treating as a mere matter of procedure the attachment of the property of a non-resident defendant, without personal service upon it, in a suit based upon the Carmack Amendment to

the Interstate Commerce Act, ignored and contravened *the principles announced* in the cases of

Pryor v. Williams, 254 U. S. 43, and
White v. Ry. Co., 238 U. S. 511.

The Williams case merely holds that the Federal Employers' Liability Act prevails over any state law upon the same subject. There was no question of attachment or jurisdiction of the Court. The case merely decides that a state cannot pass a law which is inconsistent with the Federal Employers' Liability Act.

The case of White v. Ry. Co., 238 U. S. 51, merely announces a familiar principle of law, namely, that matters of procedure depend upon the law of the place where the suit is brought, matters of substance in regard to an action based on a federal statute depend upon the statute; this case holds that in an action under the Employers' Liability Act the burden of proof as to contributory negligence is a matter of substance and not of mere state procedure.

These cases obviously have no application to the case at bar, as they merely reiterate familiar rules of law which are not applicable to the facts in the present case. We challenge petitioner to produce a single case which holds that a suit brought in a

state court by attachment without personal service is other than procedural, even where afterwards removed to the Federal Court.

III.

Is Attachment Interference with Interstate Commerce?

It is contended that the decision of the Supreme Court of Missouri is in conflict with the case of Davis, Director General, v. Farmers Equity, 262 U. S. 312.

In this case the Minnesota law provided that a foreign corporation having an agent in the state for the solicitation of freight and passenger traffic or either thereof over its lines outside of the State of Minnesota could be served with summons by delivering a copy thereof to such agent. The only question before this court was whether or not this statute as construed and applied violated the Federal Constitution.

The Santa Fe Railway Company, a Kansas corporation, had no line in Minnesota, but maintained an agent there for the solicitation of business.

The Santa Fe Railway Company was sued by a Kansas corporation in Minnesota, the suit being directed against the Director General. Service was made pursuant to the Minnesota statute above cited.

The recovery sought was for loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that state to another state. The transaction was in no way connected with the State of Minnesota or with the soliciting agent there.

The Court held that the Minnesota law compelled every foreign interstate carrier to submit to suit there as a condition of maintaining a soliciting agent within the state; that jurisdiction was not limited by the statute to suits arising out of **business transacted within Minnesota** and that this condition imposed a heavy burden upon interstate commerce.

But this Court goes on further to say:

> **"It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere, if the transaction out of which it arose had been entered upon within the state or if the plaintiff was, when it arose, a resident of the state. These questions are not before us, and we express no opinion upon them."** (Bold-face type ours.)

The Court carefully reserved the question, now raised by this record.

This Court recognizes the fact that the orderly administration of justice requires that corporations,

even though entirely engaged in interstate business, are not immune from the ordinary process of the state courts.

International Harvester Co. v. Kentucky, 234 U. S. 579.

The case of Davis, Director General, v. Farmers' Equity Company was followed by the case of Wells v. A. T. & Santa Fe Railway Company, decided by this Court May 12, 1924. This case, with which this Court is entirely familiar, is discussed hereinafter.

In the International Harvester Co. case this Court held that a corporation, although engaged in interstate business exclusively, is nevertheless subject to the ordinary procedure of attachment in the state court. This Court announced the same principle in the case of The Atchison, Topeka & Santa Fe Railway Company, petitioner, v. Edmund R. Wells et al. (decided May 12/24, opinion U. S. S. C., ad. opinions, June 1/532), by Mr. Justice Brandeis, who likewise delivered the opinion in the Davis case just referred to.

In the Wells case, Wells was a citizen and resident of Colorado and was injured in New Mexico while working for the Atchison, Topeka & Santa Fe Railway Company. Wells filed suit in Texas, but could not obtain personal service upon defendant in that state. He procured from the same Court a writ

of garnishment to a Texas railway company whose line connected with the Santa Fe. This line had in its possession Santa Fe rolling stock and also owed the Santa Fe large sums of traffic balances. Constructive service was made upon the Santa Fe by serving one of its officers at Kansas and by publication in the Texas newspapers. The Santa Fe failed to appear in the action. Judgment was rendered against it, in the sum of four thousand dollars ($4,000.00) and costs, by default. Objection was made by the garnishee to the jurisdiction, but the objection was overruled. This Court again affirmed the long-recognized principle that rolling stock held by the garnishee and used in interstate commerce and the amount due on traffic balances arising out of interstate transactions did not render the property immune from seizure by attachment or garnishment, and cited Davis v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 217 U. S. 157, which appears to be the leading case upon the proposition. But the Court held that the writ of garnishment was void for the following reasons: The Santa Fe was a Kansas corporation; it had not been admitted to Texas as a foreign corporation; it had not consented to be sued there; it did not own or operate any line of railroad within the state; it had no agent there; the plaintiff, **Wells, was a citizen and resident of another state; the cause of action arose elsewhere** against a railroad cor-

poration of another state which was engaged in interstate commerce, the said railroad neither owning nor operating a railroad in Texas, and it had not consented to be sued there.

Mr. Justice Brandeis reiterated the doctrine, as laid down in the Davis case; there is nothing added which does not appear in the Farmers' Equity Company case, but the facts in these cases were different from those in the case at bar.

In the case at bar the American Fruit Growers, Inc., has **an office in the City of St. Louis, State of Missouri; is licensed to do business in Missouri; has an agent there; has employes there; does business there, and had one of the shipments consigned to St. Louis,** so that it is not a case where the jurisdiction of a foreign state court is invoked because of the fact that the law of that state may be more advantageous to the plaintiff's cause of action, which last fact undoubtedly influenced this Court in the Farmer's Equity case and in the Wells case. In the former case the Court referred to the avalanche of litigation then pending in Minnesota courts, brought by nonresidents against nonresident carriers (26 Ill. S., l. c. 317). Certainly the American Fruit Growers, Inc., had as much right to bring suit in the State of Missouri as any domestic corporation or any individual.

Sidway v. Land and Live Stock Co., 187 Mo., l. c. 673;

McCabe v. R. R., 13 Fed. 827;
Murphree Foreign Corp., sec. 247;
R. R. v. Harris, 12th Wall., p. 65;
Express Co. v. Ware, 20 Wall. 543.

We have just discussed the three alleged errors which, it is claimed in petitioner's brief, the Supreme Court of Missouri committed. Then petitioner raises two points, namely:

1. "The Carmack Amendment having superseded all state laws as to proceedings for damages to interstate shipments, the right of defense by carriers sued on causes of action arising under the act is a substantive right which cannot be defeated or abridged by a state statute."

2. The federal laws govern as to actions against nonresident defendants under said act, and there should be no proceeding without personal service. We will discuss these in order.

I.

On the first point, six cases are cited by petitioner, but none of them hold that the right of action or the defenses are in any way affected by attachment or garnishment, and none of them hold that a suit under the Carmack Amendment can not be brought in a state court, using the state machinery of attachment and garnishment, and none of these cases hold

that constructive service in suits brought under the Carmack Amendment cannot be obtained; the question is not even discussed. Therefore we will not discuss these cases under this point. Certainly, there is nothing in the Carmack Amendment which so states, or which tends to indicate such an intention on the part of Congress. On the contrary, had Congress so intended, undoubtedly it would have so specified in the amendment. In fact, a contrary intention is deducible.

Section 22 of the Interstate Commerce Act provides in part as follows:

> "* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The proviso in Section 20, paragraph 11, of the Interstate Commerce Act is very similar to the language used in section 22, and reads as follows:

> "Provided further that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he had under the existing law."

This Court, in construing Section 22 of the Interstate Commerce Act, above quoted, in the oft-quoted

case of T. & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, l. c. 446-7, 51 L. Ed. 553, at 561, said:

> "This clause, however, cannot in reason be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned along with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as **cumulative** when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act."

In Adams Express Company v. Croninger, 226 U. S. 491, l. c. 507-8, which case is cited by petitioner, the Supreme Court, in construing the meaning of the proviso to Section 20, paragraph 11, of the Interstate Commerce Act, said:

> "What this Court said of the 22nd section of this act of 1887 in the case of Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this Court said of that contention **what must be said of the proviso in the 20th section,** that

it was evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, **whether given by the Interstate Commerce Act, or by state statute,** or common law, not **inconsistent** with the rules and regulations prescribed by the provisions of this act. Again it was said of the same clause, in the same case, that it could not in reason be construed as continuing in a shipper a common-law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

It is very clear, therefore, that this Court has interpreted the proviso of section 20, paragraph 11, **so that all the rights and remedies not inconsistent with the provisions of the Interstate Commerce Act remained in force and effect after the passage of the Carmack Amendment. Attachment, being merely a statutory form of remedy as hereinafter further shown in detail, would not be inconsistent with any proviso of the Interstate Commerce Act or with any provision of the Carmack Amendment.**

This Court has gone further even than to hold that a suit by attachment is not in conflict with the Interstate Commerce Act or with the Carmack Amendment when it held in the case of M. K. & T. R. R. Co. v. Harris, 234 U. S. 412, 58 L. Ed. 1377, that a state statute allowing attorneys' fees to a successful plain-

tiff in a suit upon a claim not exceeding two hundred dollars ($200.00) for overcharges on freight or for a claim for a loss to damaged freight, did not amount to a direct burden upon interstate commerce, and was, therefore, not repugnant to the commerce clause of the Federal Constitution, or otherwise in conflict with federal authority, and in the absence of any congressional legislation covering the subject. This Court specifically held that Congress has not so far exercised its paramount authority by enacting the Carmack Amendment of June 29, 1906, so as to prevent the application to a claim against the carrier, based upon a loss of an interstate shipment under the provisions of Texas Laws 1909, page 93, for the allowance of a reasonable attorney's fee against any person or corporation doing business in the state on account, among other things, of any claim for lost or damaged freight, if the claim was not paid within thirty days after demand and if recovery was for the full amount claimed.

This Court used the following language:

> "With respect to the specific effect of the Carmack Amendment, it has been held in a series of recent cases (cases cited omitted) that the special regulations and policies of particular states **upon the subject of the carriers' liability** for loss or damage to interstate shipments and

the contracts of carriers with respect thereto have been superseded.

"But the Texas statute now under consideration **does not** in anywise either **enlarge or limit** the responsibility of the carrier for the loss of property intrusted to it in transportation, and **only incidentally affects the remedy** for enforcing that responsibility. As pointed out in the Cade (421) Case, 233 U. S. 642, ante, 1135, 34 Sup. Ct. Rep. 678, it imposes not a penalty, but a compensatory allowance for the expense of employing an attorney, applicable in cases where the carrier unreasonably delays payment of a just demand and thereby renders a suit necessary. In fact and effect it merely authorizes a moderate increment of the recoverable costs of suit in the large class of cases that are within its sweep, among which are incidentally included claims for freight lost or damaged in interstate commerce.

"It is true that in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 183, 31 L. R. A. (n. s.) 7, 31 Sup. Ct. Rep. 164 (a case arising since the Hepburn Act), it was held that Section 8 of the Act of February 4, 1887, does not authorize the allowance of a counsel or attorney's fee in an action for loss of property intrusted to the carrier for purposes of transportation. But that is far from holding that it is not permissible for a state, **as a part of its local procedure**, to permit the allowance of a reasonable attorney's fee, under proper restrictions. In claims of this character, based upon the ordinary liability of the common carrier, although regulated

by the Commerce Act, the state courts have full jurisdiction, and some difference respecting the allowance of costs and the amount of the costs are inevitable, as being peculiar to the forum. And we think that where a state, as in this instance, for reasons of internal policy, in order to offer a reasonable incentive to the prompt settlement of small but well-founded claims, and as a deterrent of groundless defenses, establishes by a general statute otherwise unexceptional the policy of allowing recovery of a moderate attorney's fee as a part of the costs in cases where, after specific claim made and a reasonable time given for investigation of it, payment is refused, and the claimant succeeds in establishing by suit his right to the full amount demanded, the application of such statute to actions for goods lost in interstate commerce is **not inconsistent with the provisions of the Commerce Act and its amendments. The local (422) statute, as already pointed out, does not at all affect the ground of recovery or the measure of recovery**; it deals only with a question of costs, respecting which Congress has not spoken. Until Congress does speak the state may enforce it in such a case as the present."

If the imposition of an attorney's fee is permissible under a state statute, which was enacted after the Carmack Amendment went into effect, certainly the remedy of attachment in the state court would entail no additional burden and would remain open to the shipper.

Section 36 of the Judicial Code and the decisions and practice in the federal courts recognize and give effect to attachments in state courts.

Clark v. Wells, 203 U. S. 164.

There is nothing more inconsistent in the action of the American Fruit Growers, Inc., in bringing the suit under the Carmack Amendment, and obtaining jurisdiction by attachment under the state statute, than if it had begun suit by attachment against a connecting carrier for negligence. Such action certainly would not be inconsistent with the Interstate Commerce Act or with the Carmack Amendment. There would be the main cause of action and there would be the incidental proceeding or the attachment, and by no stretch of the imagination does the Carmack Amendment change or alter the status of the parties so far as the remedy of attachment is concerned.

Furthermore, it is obvious that the provisions of the Carmack Amendment did not change the liability of any carrier for its own negligence in handling shipments over its own lines.

Cincinnati & Texas Pacific Ry. v. Rankin, 241 U. S., l. c. 326.

The receiving, or initial carrier, however, is required to issue a bill of lading to destination whether

such shipment is wholly over its own line or over its own line and those of connecting carriers, and is intended to enable the shipper or holder of the bill of lading to look to such receiving carrier for his loss and damage, and simply makes the connecting carriers agents of the receiving carrier, making the latter answerable for the negligence of all, reserving, however, the right to the initial carrier to hold the carrier at fault for any loss paid under such bill of lading. The purpose of the amendment unquestionably was to avoid the necessity of forcing the holder of the bill of lading to make an investigation to determine which carrier was at fault. Under the previously existing federal or state law, the holder of a bill of lading could sue a connecting carrier for loss or damage caused by such connecting carrier's fault and the Carmack Amendment did not change this right. The same right could be enforced in the state court, and this is recognized by the federal courts. If Congress had intended to change this rule so as to deprive the state courts of the power to enforce rights previously recognized and enforceable in both federal and state jurisdictions, certainly, it would have so declared in the amendment in unequivocal language. On the contrary, it is the expressed public policy of the Federal Government not only not to restrict the jurisdiction of the state courts, but to encourage litigants to resort to the jurisdiction of state

courts. This is illustrated by the Amendment of January 10, 1914. Prior to that amendment suits and proceedings arising under any law regulating commerce were removable to the federal courts without regard to the amount involved (36 Stats. at Large, pp. 1901 and 1902, Sec. 24, Par. 8th). The Amendment of January 10, 1914, limited such removal to cases where the amount involved exceeds the sum of $3,000.00, and so, in the Federal Employers' Liability Act (4 U. S. Compiled Statutes 1913, Sec. 8662), not only have state courts concurrent jurisdiction, but when an action is brought in a state court of common jurisdiction it is not removable to the federal courts.

DUE PROCESS.

It is argued by petitioner that it would be denying to the initial and the connecting carrier, ultimately liable, due process of law, for the Court to pass upon their rights unless the initial carrier is personally served, upon whom the statute places the burden of making defense for all the carriers concerned.

This argument is answered by the Supreme Court of Missouri in a simple illustration, which is very aptly put and better stated than we could have stated it. We, therefore, quote the Missouri Supreme Court as follows (298 Mo. 747, 151 S. W. 383):

> "Numerous illustrations could be given where the same reasons might be urged as to the right

of a plaintiff to proceed against a defendant, not personally served, where no possible doubt can exist about such plaintiff's right so to proceed. For example, A, residing in Missouri, holds a note endorsed to him by B, a resident of Texas, who received the note from C, the original payee. A, having been defeated in a suit against D, the purported maker of the note, on the ground that the note was a forgery, finds property belonging to B in Missouri, files suit against him here and attaches such property. Would anyone contend that B is entitled to personal service and a personal judgment against him because he in turn must recoup his loss from C, the purported payee?

"Again, A is in B's employ in Texas and is injured in that state by B's negligence. C has written an employer's liability policy indemnifying B against loss by reason of any judgment obtained against him by his employes. After the injury C disclaims liability on the policy. A moves to Missouri and, there finding property belonging to B, files suit for damages and attaches such property. Must the suit abate because B was not personally served and must look to a suit on the policy against C to recoup his loss?

"Under both illustrations the plaintiff would be entitled to maintain the suit in this state and attach any property of the defendant found therein, regardless of personal service. Yet such seems to be the most decisive consideration in Judge Crump's reasoning. He does not base his ruling upon any language in the Carmack Amendment which can be fairly construed as denying

the right of attachment in the state court against the unserved nonresident initial carrier. He bases it upon the creation of a new liability under the act requiring the initial carrier to respond for loss or damage caused by a succeeding carrier and giving the initial carrier the right to recover against the carrier at fault. Yet, the liability thus created by the act is not essentially different, except in the manner of its creation, from the liability arising under the illustrations we have used. One is created by an act of Congress, the other by contract out of which such liability grows. The substantive rights of the initial carrier are not violated to any greater extent than are those of any defendant whose property is attached under comparable circumstances. Attachment affects the remedy. It is procedural in character, a means for enforcement of a right. The rights or liabilities growing out of a contract or inherent in it or created by a statute are not enlarged or diminished by the suing out of an attachment. As said by Mr. Justice Matthews in Pritchard v. Norton, 106 U. S., l. c. 129:

"'Whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters or process must be uniform in the courts of the same country; but whatever goes to the substance of the obligation and affects the rights of the parties, as growing out of the contract itself, or inhering in it or attaching to it, is governed by the law of the contract.'"

IV.

Personal Service in Attachment Suits.

The second point urged by petitioner in its brief on page 5 is that federal laws govern as to actions against nonresident defendants under said act and there should be no proceeding without personal service.

Petitioner cites eight cases, but none of them bear out this proposition. They are cases in which the rule is laid down that in the federal courts personal service is required before a personal judgment can be obtained against a defendant. This is true in a state court where a personal judgment is obtained; but in the federal courts, as we have indicated in this brief, personal service must also be obtained upon a defendant before an attachment lies, but this is not the rule in state courts and the federal courts have expressly recognized the rule prevailing in state courts when attachment suits have been removed from the state courts to federal courts.

> Removal Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 54);
> Clark v. Wells, 203 U. S. 164.

Petitioner argues that the Carmack Amendment partakes both of the nature of a right of action and a remedy. The cases cited by petitioner not only

fail to bear out petitioner's contention, but support the proposition of law contended for by respondents, and which proposition was sustained by the Supreme Court of the State of Missouri. For instance, in the case of Railway Co. v. Riverside Mills, 219 U. S. 206, the Court says:

> "The liability of the receiving carrier which results in such a case is that of a principal for the negligence of its own agents. * * * It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

It is thus seen that the remedy afforded is cumulative. It does not create a cause of action that never existed before, but presents remedies in addition to those theretofore prevailing, and so in the case of Adams Express Company v. Croninger, 226 U. S. 505, where the "proviso" is quoted to the effect that nothing in the Carmack Amendment should deprive any holder of such receipt or bill of lading of any remedy or right of action which he had under existing law, the Court held that these rights or remedies exclude changes effected by state statute. It is obvious that this language refers to legislation of any state which might be contrary to

federal law and has no reference to judicial steps which are **procedural in character.** This is logical. Otherwise a state could enact legislation which would directly contravene the Carmack Amendment and the proviso would thereby be construed to destroy itself. Obviously it was not the intention of Congress to permit states, through legislation, to vary or destroy the Carmack Amendment or to have forty-eight different Carmack Amendments in the forty-eight different states.

This is the kind of impossible dissimilarity pointed out in the Abilene Cotton Oil case, supra, if each court could in the first instance determine the validity of railroad tariffs.

On page 10 of petitioner's brief it is said that the Carmack Amendment has, therefore, entirely superseded the statutes and common law of the state with respect to suits for damage to interstate shipments, except in so far as said state statutes and state common law afford a mere method of procedure for the purpose of enforcing the federal rights and violate no substantial right of the defendant accorded by the federal law. A plaintiff can enforce his federal rights in the state courts and can adopt the pleading and practice of the state courts in so far as this does not prejudice substantial federal rights of the defendant, but with respect to matters of substance, as dis-

tinguished from matters of practice, the state law has, as it were, been entirely wiped out of existence.

The trouble with petitioner's position is that the petitioner fails to distinguish between a matter of substance and a matter of procedure. Petitioner has nowhere in his brief, or elsewhere, pointed out a single case which holds that an attachment or garnishment in a state court brought as an incident to a main cause of action, is a substantive right. On the contrary, all of the cases hold that it is merely a matter of procedure and some cases even go to the extent of holding that it is a mere possessory right. Petitioner, in its brief, admits that an attachment is but an incident to a suit (Petitioner's Br., p. 11).

There is no question but that the main suit can be maintained in the state court and constructive service obtained, although it may not, under the same circumstances, be maintainable in the federal court on account of the lack of personal service. This is the distinction that has been pointed out in this brief, a distinction which the federal courts, including this Court, have recognized in innumerable cases. If the petitioner is correct in its contention, then the rule of attachment, as at present constituted, would be entirely changed and revolutionized and even wiped out, and an attachment, instead of being procedural, would become a matter of substantive law, because, if it is true in one case, there is no

reason why it shouldn't be true in all cases, and such a conclusion would do away with state attachments under all federal laws, but that such was not the intention of Congress is manifest by the removal statute (34 Statutes at Large, page 198, Section 36, Chapter 231) expressly validating state attachments.

In the case of Clark v. Wells, 203 U. S. 164, it is expressly held that an attachment begun in the state court cannot be rendered nugatory in the federal courts upon removal, because Section 4 of the Removal Act, March 3, 1887, c. 373, 24 Stat. 552 U. S. Comp. St. 1901, p. 54) prohibits this. Therefore, where property of a nonresident defendant is seized under a state statute and the case is then removed to the federal court, the lien obtained through the attachment is preserved in the federal court, although a suit under the same circumstances could not be maintained in the federal court without obtaining personal service. If attachment laws deny defendants due process of law, then Section 4 of the Removal Act, March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 54) would necessarily be unconstitutional. This Court, however, has in these very cases upheld the constitutionality of the Removal Act.

In the case of International Harvester Company of America v. Commonwealth of Kentucky, 234 U. S. 579, the rule is recognized, first, that a foreign cor-

poration engaged in interstate commerce only is not for that reason immune from the service of process under the laws of the state in which it is carrying on such business. It is also held, recognizing the doctrine laid down in the Davis v. Big Four case (cited supra), that the states may pass laws enforcing the rights of citizens, which affect interstate commerce, which fall short of regulating such commerce in the sense used in the Constitution (citing Sherlock v. Alling, 93 U. S. 99; Johnson v. Chicago & P. Elevator Co., 119 U. S. 388; Kidd v. Pearson, 128 U. S. 1; Pa. R. R. Co. v. Hughes, 191 U. S. 477; The Winnebago, 205 U. S. 354).

It is contended by the petitioner that where an attachment or garnishment law under a state statute is resorted to as an aid to the principal cause of action and the principal cause of action arises under a federal statute, that the character of the attachment or garnishment changes from remedial to substantive. By what species of ratiocination petitioner arrives at this conclusion is not at all clear, for the attachment or garnishment is something entirely distinct and separate from the cause of action proper and is merely incidental thereto, even petitioner admitting the last statement (Petitioner's Br., pp. 11 and 12).

In support of its statement, petitioner cites Laborde v. Ubarri, 214 U. S. 174, where the Court holds that

an attachment is but an incident to a suit, and unless jurisdiction can be obtained over the defendant his estate cannot be attached in a federal court. Obviously, this must be so in the federal court, where the federal rule requires personal service upon the defendant, but this argument advanced by petitioner falls of its own weight because of the fact that if personal service is not required in the main action, then the attachment or garnishment, as incidental actions, will lie. The validity of state attachment and garnishment statutes have been upheld so frequently and generally that we do not deem it necessary to expatiate upon them other than to refer to a few of the numerous cases.

Davis v. R. R., 217 U. S. 157;
Chicago, Rock Island & Pac. Ry. Co. v. Sturm, 174 U. S. 710;
Harris v. Balk, 198 U. S. 225.

Unless there is some special reason why an exception should be made in cases arising in interstate commerce, then the argument of the petitioner falls of its own weight. This brings us to the question as to whether or not a cause of action arising under an interstate commerce transaction presents any features different from those arising in other transactions. Can it be possible that state attachments, which have been upheld in thousands of cases, have

suddenly become invalid because the cause of action arose under an interstate commerce transaction? It would indeed require a long stretch of the imagination to see how a lawsuit perfectly legitimate in all respects can have any direct bearing or effect upon interstate commerce. This Court has repeatedly held that interstate commerce is not sufficiently affected or influenced by attachments under state statutes to render such attachments invalid, even where the vehicles of transportation, while standing idle in states, have been seized under attachment rights.

Davis v. R. R., 217 U. S. 157;
International Harvester Co. v. Kentucky, 234 U. S. 579;
Sherlock v. Alling, 93 U. S. 99;
Johnson v. Elevator Co., 119 U. S. 388;
Kidd v. Pearson, 128 U. S. 1;
Pa. R. R. Co. v. Hughes, 191 U. S. 477;
The Winnebago, 205 U. S. 354.

Upon what theory, then, can it be said that a garnishment, which may tie up traffic balances, and which in no way interferes with interstate commerce operations, can possibly constitute such a direct interference as to justify a revolution in the attachment laws of the states and abrogate the same? As has been said in a number of the decisions of this Court, interstate commerce is only remotely or indirectly affected by state attachments. Were this

Court to declare the state attachment and garnishment laws ineffective where the transactions out of which the original cause of action arises are interstate in character, the very purpose of the state laws which have so frequently been upheld by this Court would be undermined and destroyed. This Court was dealing with different situations in the Wells case and in the Davis Director General case. These cases exemplified types of litigation that were brought. This Court obviously was not in sympathy with the practice of cluttering up the dockets of the states involved in these cases with foreign litigation.

POINTS AND AUTHORITIES.

I.

Attachment under state statute on a nonresident defendant without personal service will lie upon interstate shipments when there is no interference with interstate commerce.

Davis v. Big Four R. R. Co., 217 U. S. 157;
Chicago, R. I. & P. R. R. Co. v. Sturm, 174 U. S. 710;
Harris v. Balk, 198 U. S. 225;
Martin v. West, 222 U. S. 191.

II.

The Carmack Amendment does not provide an exclusive remedy, but expressly provides "that the act shall not deprive any holder of a bill of lading of any remedy or right of action which he has under existing law."

Amendment of 1906 (Carmack Amendment) to Interstate Commerce Act of Feb. 4, 1887;
Ga. etc. R. Co. v. Blish Milling Co., 241 U. S. 190 (1916);
Bichlmeir v. Minn. R. Co., 159 Wis. 404;
Adams Express Co. v. Croninger, 226 U. S. 491;
Elliott v. Chicago etc. R. Co., 35 S. Dakota 57 (1915);

Western etc. R. Co. v. White Prov. Co., 142 Ga. 246 (1914).

III.

A proceeding in attachment is only incidental to a cause of action and is not the cause of action itself. It is remedial in nature and not a substantive right.

Revised Statutes of Missouri 1919, Sec. 1725;
Laborde v. Ubarri, 214 U. S. 174.

IV.

Garnishment is incidental to a suit in attachment, and, like attachment, may be brought in aid of the cause of action, but is not a cause of action proper. It is remedial in nature and not a substantive right.

Revised Statutes of Missouri 1919, Sec. 1846;
Tinsley et al v. Savage, 50 Mo. 141,
Evans-Snider-Buel Co. v. McFadden, 185 U. S. 505;
Rice et al. v. Adler-Goldman Com. Co., 71 Fed. 151;
Peoples Savings Bank and Trust Co. v. Batchelder-Egtas Co., 2 C. C. C. A. 124 (n. s.) App. 6035, 1 Fed. 130;
Hanscom v. Malden and Melrose Gaslight Co., 220 Mass. 8;
28 Corpus Juris, sec. 9, part C, also p. 19;
King v. Cross, 175 U. S. 396;
Faulkner v. Chandler, 11 Ala. 725;
Fisher v. Hervey, 6 Colo. 16;

Heineman v. Schloss, 83 Mich. 153;
Philbrick v. Philbrick, 39 N. H. 468;
Freberg v. Singer, 90 Wis. 608;
Sears v. Seaboard Air Line R. Co., 3 Ga. A. 614;
Wheeler v. Chicago Title etc. Co., 217 Ill. 128;
Wooding v. Puget Sound Nat. Bank, 11 Wash. 527;
Klaus v. Green Bay, 34 Wis. 628.

V.

The construction placed upon attachment statute by the Supreme Court of the state is binding on the federal courts sitting in that state.

Rice et al. v. Adler-Goldman Commission Co., 71 Fed. 151;
Peoples Saving Bank & Trust Co. v. Batchelder-Egtas Co., 2 C. C. C. A. 1924 (n. s.) App. 6035, 1 Fed. 130.

VI.

A foreign corporation, licensed to do business in a state, and having an agent there, has the same right to bring suit in such state as a domestic corporation or an individual, and has the constitutional and statutory rights, both state and federal, of a domestic corporation, relating to the institution of suits.

Sidway v. Land and Live Stock Co., 187 Mo., l. c. 673;

McCabe v. R. R., 13 Fed. 827;
Railroad v. Harris, 12 Wall., p. 65;
Murphree Foreign Corporations, Sec. 247;
Express Co. v. Ware, 20 Wall. 543.

ARGUMENT.

I.

History and Purposes of Attachments and Garnishments.

A.

We wish to discuss very briefly the history and purposes of attachments and garnishments, for the purpose of showing the origin and purpose of these unusual proceedings and to show that attachments and garnishments are remedies and are procedural in character as opposed to substantive rights. Numerous definitions have been given of attachment, and the definition given in Corpus Juris is, perhaps, as good as any.

In 6 C. J., p. 28, Note 1, the following definition is taken from Wilder v. Inter-Island Steam Nav. Co., 211 U. S. 239:

> "The word 'attachment,' as ordinarily understood in American law, has reference to a writ, the object of which is to hold property to abide the order of the Court for the payment of a judgment in the event the debt shall be established."

Attachments may be used for two purposes, first, to compel the appearance of the defendant; second, to

seize and hold the property for the payment of debt, to collect which suit is brought.

We are not concerned here with the first kind, but the second kind of attachment was originally unknown at common law, and had its origin in England and grew out of the local custom of London merchants, whereby, if a judgment was affirmed and an execution was returned unsatisfied, the plaintiff had a right to garnishee the debtors of the defendant, and after certain proceedings were entitled to judgment. Personal service upon the defendant was not necessary, and the debt due the defendant could be reached. Therefore, the very purpose of the remedy by attachment would very frequently be defeated if personal service were required in state actions as contended for by the petitioner. Were a cause originally brought in the federal court it would be clear that personal service would be required, because this is the universal rule in federal courts. Were the remedy by attachment a substantive right in the sense that the Carmack Amendment made provision for bringing suits under the Carmack Amendment by attachment and in no other way, attachments would be the method prescribed by the act and would be a part of the cause of action. This is what petitioner has in mind when it contends that a substantive right is part of the cause of action, irrespective of whether brought in the federal court or whether in the state court. And so it is

where a statute of the state gives a cause of action which did not exist at common law and provides an exclusive method of procedure and remedy, this method and remedy must be pursued. But how does this apply to the Carmack Amendment, which nowhere provides that the suit must be brought by attachment or that personal service must be had? The Carmack Amendment is an additional remedy provided by Congress, and all the rights and remedies which have heretofore existed still remain intact. In other words, it is cumulative, and so the argument advanced by petitioner in petitioner's brief, on page 22, is without either form or substance in so far as it contends that suit cannot be commenced in the state court by attachment without personal service under the Carmack Amendment or the Federal Employers' Liability Act. Then it is contended by the petitioner that the phrase, "existing law," used in the Carmack Amendment, means existing common law as understood in the federal court and excludes changes effected as understood in the federal court. It is obvious that the construction placed upon this phrase in the case of Adams Express Co. v. Croninger, 226 U. S. 503, cited by petitioner, and the case of Lysaght v. Lehigh Valley R. Co., 254 Fed. 353, hereafter discussed, simply means that the state cannot pass legislation which would cause the proviso to destroy the act itself, but certainly it has no reference to the man-

ner of proceeding in the state court or to anything which pertains properly to the state forum, as said in the Lysaght case, and which is likewise quoted by petitioner: "The phrase, 'existing law,' means existing common law as understood in the federal courts and excludes changes effected by state statutes." Petitioner contends (Petitioner's Br., p. 9) that the common law referred to must be the common law of the federal courts. There is no such thing as a common law of the federal courts as distinguished from the common law of the state courts. A federal court enforces the common law of the state where it is sitting.

Bucha v. Cheshire R. Co., 125 U. S. 555;
Burgess v. Seligman, 107 U. S. 20.

History of Carmack Amendment.

Even at the risk of appearing to be repetitious we will set out briefly the history of the Carmack Amendment, as we believe it will throw some light upon the intention of Congress in enacting the amendment.

Prior to the passage of the Carmack Amendment in 1906 an interstate case against the initial carrier could have been maintained in either the federal or state courts, and anterior rights are expressly reserved by the Carmack Act. It was not the purpose of this act to abridge the shipper's remedies but to enlarge them.

In the case of Adams Express Company v. Croninger, 246-491, it is held that prior to the amendment the rule of the carrier's liability for the interstate shipment of property as enforced in both the federal and state courts was either that of the general common law as declared by that court and enforced in the federal courts of the United States, or that determined by the public policy of a particular state or that prescribed by the statute law of a particular state; but each carrier was responsible only for the loss occurring on its own line. Therefore, so much of the provision of the amendment as makes the carrier receiving goods for transportation to a destination beyond its own terminals responsible for loss or damage occurring on any portion of its own line is declaratory of the common law, and the only right of action given the legal holder of a bill of lading in interstate commerce shipments is against the initial carrier, where the primary cause of liability is upon the subsequent connecting carriers. This is expressly so held in St. Louis etc. R. Co. v. Mounts, 44 Okla., p. 359 (1914). The Court said: "The right of action against an initial carrier is extended to cases where the primary cause of liability is upon a subsequent connecting carrier, and in favor of the lawful holder of a bill of lading or receipt issued by the carrier; but it is further provided that such initial carrier may recover from such connecting carrier the amount of such loss,

damage or injury as it may be required to pay owners of property, etc. Except as to the said extension of the right of action to the cases specified above, namely, where the loss or damage occurs on the line of a connecting carrier, the Carmack Amendment **is merely affirmative of the pre-existing law** in this respect."

The manifest object of this provision of the statute is to enable one to contract with a common carrier for the carriage of goods to a part of another state over its lines, and over the connecting lines of other carriers and to recover damages directly from the carrier to whom the goods were delivered and by which the bill of lading therefor was issued, without being compelled to seek out and sue the particular carrier that occasioned the injury. The legal effect of the provision so far as it relates to a carrier is to impose upon it a legal liability to perform and complete by delivery at the destination every contract of interstate carriage into which it may enter for itself and for its connecting lines from which escape can be made neither by rules nor negligence of its own, or contract or consent of the shipper. The legal effect of the provision, so far as it relates to a shipper, is not to confer upon him a right to a new kind of contract, but to extend to him rather a new and additional remedy upon the kinds of contracts that he may heretofore have been able to make, by offering

him an opportunity to sue the carrier to whom the property was delivered for shipment under the liability imposed upon the carrier by the statute (Bowden v. Philadelphia etc. R. Co., 91 Atlantic, p. 209 (Del. 1914).

In the Croninger case, cited supra, the following language is used: "The liability thus imposed is limited to any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered, and plainly implies a liability for some default in its duty as a common carrier." In 241 U. S. 226 the Court said: "Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine heretofore approved by us in respect to a carrier's liability for loss occurring on its own line." To the same effect is Louisville etc. Ry. v. Brewer, 183 Ala., p. 172 (1913), and Cincinnati & Tex. Ry. v. Rankin, 241 U. S., l. c. 326.

By parity of reasoning, under the Carmack Amendment the connecting carriers are not relieved from liability for acts of negligence which occur on their respective lines, but each is liable for its own acts. This doctrine is expressly laid down in the case of Georgia etc. Ry. v. Blish Milling Co., 241 U. S., p. 190 (1916).

The Carmack Amendment merely places the shipper in a position where he may be able to recover for

injured or damaged property and relieve himself oftentimes from the task of locating the active tort-feasor, but if the shipper can locate the carrier which caused the damage he may sue that one alone (Elliott v. Chicago etc. R. Co., 35 S. Dakota 57 [1915]; Western etc. R. Co. v. White Provision Co., 142 Georgia 246 [1914]; Eastover Mules etc. Co. v. Atlantic Coast Line R. Co., 99 S. C. 470 [1914]; Louisville etc. R. Co. v. Lynne, 71 So. [Alabama 1916]; Coats v. New Orleans Term. Co., 139 Louisiana 958 [1916]; Newborn v. Louisville etc. R. Co., 170 N. C. 205 [1915]; St. Louis S. W. R. Co. v. Ray, 127 S. W. 281 [Tex. Civ. App. 1910]).

In Bichlmeir v. Minneapolis etc. R. Co., 159 Wis. 404 (1915), the Court uses the following language: "This amendment clearly gives the right of action against the initial carrier. But is such remedy exclusive?" So the remedy given by the amendment was additional to and concurrent with any other existing federal remedy. The question, therefore, arises whether under federal law prior to the enactment of the Carmack Amendment a shipper had a right of action against a carrier negligently causing the damage, but who was not the carrier with whom the initial contract of shipment was made. An affirmative answer to this question was given by the Supreme Court of the United States in the case of New Jersey S. N. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed.

465, and so far as we have been able to discover the rule there announced has remained unchanged. Such are also the uniform holdings of state courts. (See 1 Hutchinson, Carr [3d ed.], sec. 236, and cases cited; 4 Ruling Case Law, 404, and cases cited.) The reason of the rule that the owner of the goods may proceed directly against the carrier who is the actual wrongdoer, even if he has a remedy against the receiving carrier, is that each carrier is an agent of the owner authorized to contract with the connecting carrier for the safe transportation of the shipment, which, when undertaken by such carrier, becomes a contract with the owner, for a breach of which he can proceed directly against the carrier in default.

In the case of Duvall v. Louisiana Western R. Co., 135 La. 189, the Court uses the following language: "The object which Congress had in view in enacting that amendment is said by the Court in the case of Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 186, to have been simply to impose liability upon the initial carrier for the faults of the succeeding carrier, any agreement or stipulation to the contrary notwithstanding. There is nothing to lead us to suppose that Congress had the further object in view of doing away with the said rule of evidence. Congress was conferring a right of action. It was not dealing with the question of what evidences the Court should deem sufficient for the proof of a particular fact at issue

between the litigants. The said rule of evidence has absolutely nothing to do with the substantial rights of the parties. It is simply an aid to the Court in weighing the evidence. The plaintiff, having to prove that the loss occurred upon the defendant company's line, offers evidence going to show that the goods were received in good condition by the initial carrier, and, having made this proof, contends that it establishes the fact that the loss of, or damage to, the goods occurred on the line of the defendant company, and in support of that contention invokes this rule of evidence; and this rule of evidence comes in aid of the Court in that task. This case was followed in Chicago etc. R. Co. v. Harrington, 44 Okla. 41 (1914). In the case of Baltimore etc. R. Co. v. Sperber, 117 Md. 595 (1912), the Court held that the Carmack Amendment was therefore evidently intended to be cumulative and not to furnish an exclusive remedy. It is pointed out that where the shipper is required to use a terminal carrier at a great distance it works a hardship upon the carrier, and frequently results in a failure to recover because of his failure or inability to obtain the necessary evidence with which to prove his case. It is likewise argued that if the shipper were compelled to sue the initial carrier and under the Carmack Amendment would have no redress or recourse against the connecting or terminal carriers, great injustice might arise if the shipper were forced

to sue the initial carrier only. Clearly such was not the intent of Congress in enacting this legislation. In the case of New York etc. Transportation Line v. Baer, 118 Md. 73 (1912), the rule is laid down that where neither of the defendants is the initial carrier they are not in this case in anywise affected by the act of Congress called the Hepburn Act, with the amendment thereto known as the Carmack Amendment, and are, therefore, subject only to liability imposed upon them by the common law.

The question as to whether or not connecting or terminal carriers could be sued received consideration at the hands of the Georgia Appellate Courts with various results. The first time the case arose (Atlantic Coast Line R. Co. v. Thomasville Live Stock Co., 13 Ga. App. 102 (1913), it was decided that there was nothing in the Hepburn Act and in the Carmack Amendment which precluded a shipper from suing under the provisions of Section 3752 of the Georgia Civil Code of 1910. This rule, however, was expressly overruled in Southern R. Co. v. Bennett, 17 Ga. App. 162 (1915), where the Court ruled that the rights and remedies conferred by existing state laws where a shipment accepted by a carrier for interstate transportation has been lost were not continued in force by the proviso of the Carmack Amendment, and that the proviso only preserves rights or remedies that the holder of the bill of lading may have had under exist-

ing federal law at the time of the action; and the Court held that the terminal carrier could not be held, and that only the initial carrier could be held. However, this last case was expressly overruled in the case of Central of Georgia R. Co. v. Waxelbaum Produce Co., 89 S. E. 635 (Ga. App. 1916). The last decision is based upon the ruling of the Supreme Court of the United States in the Blish Milling case, cited supra, and unquestionably this is the correct doctrine and accords with the rulings of the Supreme Court of the United States and also of the state courts.

The Carmack Amendment has also received construction at the hands of the Missouri Supreme Court as enunciated in the case of Donovan v. Wells-Fargo & Co., 265 Mo. 291. The tenor of this decision is in accord with what has been said above, that in any state law or decision which conflicts with interstate commerce, provisions referred to above must give way; but we have shown above that the Carmack Amendment, except in so far as it provides an additional remedy to the shipper in permitting the initial carrier to be sued for the acts of negligence of connecting and terminal carriers involved in the shipment, is merely declaratory of the common law and the shipper has all of his rights of action against the initial carrier, connecting carriers, or the terminal carrier, depending upon whose act caused the damage, and providing further that the shipper can prove

such negligence of such carrier. In the case of Atchison etc. R. Co. v. Boyce, 171 S. W. 1094 (Tex. Civ. App. 1914), the Court said: "The act was passed for the benefit of the shipper. He can sue the initial carrier alone or any of the connecting carriers, or all jointly, for the damages. We do not understand that an election can be required where a party's rights are analogous, consistent, or concurrent. As we understand, under the Interstate Commerce Act, the contract is made by the initial carrier for all connecting carriers, by the terms of which each and all are bound, and a failure of duty or the negligence of either gives the shipper a right of action against either or all under the act against the initial carrier for all the damages and the connecting carriers for the damages occurring on their respective lines." In the case of Miller v. Chicago etc. R. Co., 85 Neb. 458 (1909), it was held that the Carmack Amendment does not in any manner supersede or amend the rule at common law with reference to the liability of a common carrier for its negligence in the transportation of property by interstate shipments.

III.

The trouble with petitioner's contention is that he is undertaking to transform a mere matter of procedure into a matter of substance, into a new right of action, and yet petitioner admits that an attach-

ment is but an incident to a suit, but petitioner states that unless the suit can be maintained the attachment must fall. In the federal court, because of the rule requiring personal service attachments, personal service must be obtained upon defendants in attachment suits, and suit cannot be maintained by attachment unless service is obtained, but in the state court, clearly the suit will lie, and even if the petitioner had the right of removal to the federal court, the sequestration of the property would remain intact by virtue of the federal statute, although only constructive service is had.

Removal Act, March 3, 1875, ch. 137;
18 Stat. L. 471;
Sec. 36, Jud. Code;
Clark v. Wells, 203 U. S. 164.

If petitioner's contentions were correct all suits and attachments brought in the state court would be dissolved upon removal to the federal court where personal service was not obtained and all judgments obtained upon such removal would be void. Obviously Congress did not desire that the convenient and necessary remedy by attachment in the state court be destroyed or impaired when it enacted the said statute. Why should any exception be made in the case of the Carmack Amendment or any other law which is highly remedial, and why should a construction be placed

upon the law which obviously does not appear there, which has no place in the law, and which was never intended to be in the law, merely for the convenience of railroads which seek to deprive shippers of remedies which exist, which should exist, and which Congress enacted for the purpose of securing justice for shippers? While a suit brought by attachment in the federal court cannot be maintained unless the main suit is maintainable, which in the federal court means that personal service must be had upon the defendant, yet the suit is maintainable in the state court through the statutory service, which may be constructive or by publication, and while a personal judgment cannot be obtained, a judgment is collectible to the extent of the goods or valuables sequestered. It follows, therefore, that if the petitioner's conclusions were accepted by this Court all state attachments brought as incidental to causes of action arising under federal statutes would be done away with; that such was not the intention of Congress is indicated by 34 Statutes at Large, page 1098, Sec. 36, Chapter 231, which has been heretofore adverted to.

Petitioner undertakes to show that an attachment in a state court is a substantive right rather than a mere matter of procedure in foreign attachments—that is, attachments against nonresidents. If this is true in one case why is it not true in all? It certainly would be illogical for any court to undertake

to hold that a foreign attachment in a state court is good in one case and not good in another, if attachment is a matter of substantive law. A glance at the cases cited by the petitioner show that they do not uphold petitioner's contention. They clearly deal in generalities, but do not fit the facts in the case at bar. For instance, in the case of Pritchard v. Dworkin, 106 U. S. 128, the general rule merely is laid down that whatever relates to the remedy and constitutes part of the procedure is determined by the law of the forum and whatever goes to the substance of the obligation and affects the rights of the parties is governed by the law of the contract. We fully concur in this pronouncement of a legal principle, but as we shall presently conclusively show, attachment is procedural and a part of the remedy, and, therefore, these cases have no application. And so in the case of White v. Railway Co., 238 U. S., p. 511, cited by petitioner, the same rule of law is announced and it is there held that the burden of proof as to contributory negligence is a substantive right rather than a mere matter of state procedure because the degree of contributory negligence directly affects the question of recovery, while attachment only indirectly does so and has nothing to do with the merits of the main cause of action. And so the case of Slater v. Ry. Co., 194 U. S. 126, cited on page 16 of petitioner's brief, has no application because this case merely

holds that where a cause of action is given by a statute the defendant must obtain the benefit of whatever limitations on his liability the said law imposes. There is a long line of authorities which hold that attachment is an ancillary remedy.

In Parks Co. v. City of Decatur, 138 Fed. 553, it is held that an attachment is an ancillary remedy (citing 4 Cyc, p. 398).

In Evans-Snider-Buel Co. v. McFaddin, 105 Fed. 293, 58 L. R. A. 900, affirmed in 185 U. S. 505, it is held that a right of attachment is nothing more than a remedy afforded by law for the collection of a debt. It is like a capia ad respondendum and a remedy of that nature may be abolished by the Legislature which created it. This doctrine is approved in Bank v. Reithman, 79 Fed. 582; Lears v. Seaboard Air Line Ry. Co., 3 Ga. App. 621; Stevenson v. Doe, 8 Blackf. (Ind.) 506.

In Lowenthal v. Hodge, 120 Appellative Div. 304, 104 N. Y. S. 120, it is held that an attachment is merely a possessory process.

These cases hold that garnishment is an auxiliary proceeding, growing out of and dependent upon another original or primary action or proceeding, and this, regardless of whether it is resorted to in aid of a pending action before judgment or in aid of an execution for the enforcement of a judgment recovered in the principal action or proceeding, or is com-

menced concurrently with the principal action, as where attachment is instituted by service of a writ of garnishment, or even where the statute authorizes the service of the garnishment writ before service by publication upon the principal defendant. This rule runs through the whole procedure to procure and sustain a garnishment, and, where the principal action fails, the garnishment also fails. Conversely, where there has been neither personal service nor general appearance by defendant in the principal action, such action is in a way dependent upon the validity of the garnishment proceeding. The same is true where the action is commenced by garnishment process.

28 Corpus Juris, p. 21;
Pratt v. Albright, 9 Fed. 634, 10 Bliss 511 (under Wisconsin statute);
Bear v. Hays, 36 Ill. 280;
Maynards v. Cornwell, 3 Mich. 309;
Wilson v. Pennoyer, 93 Minn. 348, 101 N. W. 502;
Martin v. Harvey, 54 Miss. 685;
Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S. W. 906, 6 Ann. Cas. 751;
State v. Hughes, 135 Mo. A. 131, 115 S. W. 1069;
Tinsley v. Savage, 50 Mo. 141;
Field v. Sammis, 12 N. M. 36, 73 P. 617;
Perea v. Colorado Nat. Bank, 6 N. M. 1, 27 P. 322;
Kelly v. Gibbs, 84 Tex. 143, 19 S. W. 380, 563;

Durham v. Scrivener (Civ. A.), 228 S. W. 282;
Townsend v. Fleming (Civ. A.), 64 S. W. 1006;
Kelly v. Ryan, 8 Wash. 536, 36 P. 478;
Garland v. McKittrick, 52 Wis. 261, 9 N. W. 460.

Remedial Character of Garnishments.

Statutes authorizing garnishment are remedial, in that they pertain to and affect a remedy as distinguished from a right. This rule finds its principal application in connection with the validity of garnishment statutes and their construction.

28 Corpus Juris, p. 19;
Faulkner v. Chandler, 11 Ala. 725;
Fisher v. Hervey, 6 Colo. 16;
Lears v. Seaboard Air Line R. Co., 3 Ga. A. 614, 60 S. E. 343;
Wheeler v. Chicago Title etc. Co., 217 Ill. 128, 75 N. E. 455;
Heineman v. Schloss, 83 Mich. 153, 47 N. W. 107;
Wooding v. Puget Sound Nat. Bank, 11 Wash. 527, 40 P. 223;
Freiberg v. Singer, 90 Wis. 608, 63 N. W. 754;
Klaus v. Green Bay, 34 Wis. 628.

Validity, Construction, Operation and Effect of Garnishment Statutes Generally.

The validity of garnishment statutes are tested by the rules in determining the validity of remedial

statutes generally. And, aside from the rule that the constitutional guaranty against impairment of the obligation of contracts applies only to retroactive statutes, garnishment statutes do not come within such guaranty, either because of provisions for discharge of the debt garnished without direct payment to the original creditor, according to the obligation of the original contract, or because the place of payment may incidentally be changed. In arriving at the proper interpretation of garnishment statutes, recourse should be had to the rules controlling and aiding the construction of statutes generally, with specific reference to the rules applicable to remedial laws.

28 Corpus Juris, Sec. 9, part c;
King v. Cross, 175 U. S. 396;
Faulkner v. Chandler, 11 Ala. 725;
Fisher v. Hervey, 6 Colo. 16;
Heineman v. Schloss, 83 Mich. 153;
Philbrick v. Philbrick, 39 N. H. 468;
Freiberg v. Singer, 90 Wis. 608.

Original or Auxiliary Process.

Although some statutes have made attachment an original process for the commencement of a suit, the proceeding is usually a mere provisional remedy ancillary to an action commenced at or before the time when the attachment is sued out. Being of this nature, the attachment does not affect the decision

of the case upon the merits and the judgment in the main action neither changes the nature nor determines the validity of the attachment, and, if the attachment be dissolved, this alone will not necessarily defeat the action. An attachment proceeding is so independent of the main action that an order in such proceeding may, when final, be the subject of appeal during the pendency of the main action.

IV.

Furthermore, the federal rule is that the construction placed upon an attachment statute by the Supreme Court of a state is binding on the Federal Court sitting in that state.

Rice et al. v. Adler-Goldman Commission Co., 71 Fed. 151;

People's Savings Bank & Trust Co. v. Batchelder-Egtas Co., 2 C. C. A., 1264 U. S. App. 6035, 1 Fed. 130.

The Missouri Supreme Court holds that attachments and garnishments are procedural.

State ex rel. St. L. & B. R. R. Co. v. Taylor, 298 Mo. 474.

Analogy of Federal Employers' Liability Act to Carmack Amendment in so far as Bringing Suit in a State Court Is Concerned.

The Federal Employers' Liability Act, as amended in 1910, provides that an action may be brought in the Circuit Court of the United States in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.

It also provides that a cause of action brought in a state court shall not be removed to the federal court. The law applicable, therefore, must be the state statute, and the law applicable in this respect to a cause of action is the same as that applicable to any other cause of action brought against the same defendant.

> Thornton's Federal Employers' Liability Act, 3rd Ed., p. 289.

The learned writer holds that the state statute not only controls the state procedure, but also the law relating to the venue.

In conclusion, we desire to call the Court's attention to the argument of petitioner that it would be unfair to compel carriers to litigate matters far from their homes (Petitioner's Brief, p. 22). Petitioner

also states that such litigation is costly. Surely petitioner is not serious. We must assume that petitioner would not indulge in frivolities in the highest tribunal in the land, and, therefore, we make reply to the argument by asking who is in a better position to litigate away from home, the carrier, with its skilled corps of experts, its unlimited resources, and its ability to offer passes to witnesses, or the shipper, who has to hire an attorney and who has to pay the expenses, including the railroad fare of witnesses and who lacks the resources and organization of the carrier? Where the initial carrier is sued at the destination, the initial carrier can immediately notify the connecting carrier and the terminal carrier to come in and defend the suit, or to aid in the defense, while to force the shipper to go to the domicile of the initial carrier will virtually deprive the shipper of the benefits of the Carmack Amendment. Had such been the intention of Congress this intention undoubtedly would have been clearly expressed and as part of the Carmack Amendment, Congress would have enacted the proviso that the shipper must go to the domicile of the initial carrier to bring suit, because, in the big majority of cases, the initial carrier does not live in the same domicile with the shipper, and, therefore, personal service cannot be obtained. If he did live there, there would be no occasion to sue the connecting or terminal carriers, except in the case

of insolvency of the initial carrier. The shipper's common-law rights and remedies against each carrier remain intact. The Carmack Amendment merely adds an additional remedy, which is and should be highly remedial. It would be difficult, indeed, to believe that any court would place such a construction on the Carmack Amendment as to virtually destroy its effectiveness. We believe this Court should so construe the Carmack Amendment as to give the correct effect to the intention of Congress, which was to provide an enactment which would be highly remedial and which would enable the shipper to obtain a complete and speedy recovery against the carriers transporting shipments, leaving the question of liability to be settled between these carriers, since the carriers know or can readily ascertain where the fault lies, while it would be virtually impossible for the shipper to ascertain this, and even where he can ascertain it, he can only do so at a prohibitive expense.

The petitioner makes the statement (p. 1, Petitioner's Brief) that this action is based upon the Carmack Amendment for damages **presumed** to have accurred upon the line of the delivering carrier. Is there such a presumption under the Carmack Amendment? Does not the Carmack Amendment do away with the presumption, against the terminal carrier, so far as the shipper is concerned, and provide for the

liability of the initial carrier, irrespective of which carrier actually caused the loss or damage? This must be correct, since the courts have held that the acts of the connecting and terminal carriers are the acts of the initial carrier, as the former are agents of the latter under the Carmack Amendment.

Obviously, the construction contended for by petitioner would frustrate the very purpose of the Carmack Amendment and would make an unfair distinction in favor of railroads and against other persons.

Why make a distinction where railroads are involved? Constitutional law is constitutional law whether applied to giant railroads or to humble shippers. The principles of law applicable are the same. The facts in the case at bar present a usual and ordinary situation for the invocation of the statutory remedy of attachment. The courts of this state unquestionably would have jurisdiction to attach moneys due from any person out of this state to any person in this state, and, after all, when the facts in this case are fully analyzed, they simply amount to a like situation. There is money in Missouri belonging to a nonresident corporation and due to a corporation in this state. Therefore, the state court had jurisdiction to attach the money in the hands of the Illinois Central Railroad Company just as this state would have a right to afford a remedy by attachment against any individual. The tempo-

rary writ should therefore be quashed, and we respectfully request that the same be done.

Respectfully submitted,

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